IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| INQUIRY CONCERNING A | ) | Supreme Court |
| JUDGE, NO. 02-487 | ) | Case No. SC03-1171 |

**COMMISSION'S RESPONSE TO MOTION TO DISMISS REGARDING ALLEGED EVIDENTIARY IMPROPRIETIES**

The gravamen of the Respondent's Motion to Dismiss is that Assistant United States Attorney Jeffrey Del Fuoco came into possession of two Air War College papers, one which appeared to have been submitted by Judge Gregory Holder to the Air War College and another prepared by Colonel David Hoard, that the papers were in an envelope with a note and that while in the possession of the U.S. Attorney's Office, the envelope and note were lost.

**THE FACTS**

The deposition testimony of Assistant U.S. Attorneys Jeffrey Del Fuoco and Jeffrey Downing establish the following[1]: Del Fuoco received the two papers in a plain envelope with a note at the Army Reserve Office on the January

[1] Copies of the pages of the depositions of Assistant U.S. Attorneys Jeffrey Del Fuoco and Jeffrey Downing referred to in this Response are attached hereto as Exhibits A and B.

12-13, 2002 weekend, put them in his briefcase and on Monday, January 14, 2002, brought them to the U.S. Attorney's Office. Del Fuoco went through the documents and then placed them in an official U.S. Attorney's file, but Del Fuoco does not recall whether he personally put the documents in the file or whether the file was secure (Del Fuoco depo, pp. 70-72, 87-88). Del Fuoco did not consider the documents as evidence, but only a tip which would require investigation (Del Fuoco depo, p. 84). On one occasion, Del Fuoco showed the documents to two Air Force Special Investigations agents, and on another occasion looked at the documents as part of a file review with his supervisor (Del Fuoco depo, pp. 88-97). On October 21, 2002, Del Fuoco turned the file over to Assistant U.S. Attorney Downing. When he learned that the envelope and note were no longer in the file, he assumed they had been lost (Del Fuoco depo, pp. 134-135).

Downing received the official U.S. Attorney file from Del Fuoco and observed that the file contained an envelope, although he could not tell if the envelope was associated with the Air War College papers. He does not, however, recall seeing a note (Downing depo, pp. 11-12). Del Fuoco told Downing that he had received a note with the papers and Downing at some point became aware that the envelope and note

were not in the file (Downing depo, pp. 12-13). When he asked Del Fuoco, he was told that they should be in the file (Downing depo, pp. 12-15). On several occasions, Downing took the papers out of the file, unstapled them, made copies and restapled them (Downing depo, pp. 16, 19). Downing retained the two Air War College papers which he had received from Del Fuoco in a file called "Originals" until they were turned over to the undersigned counsel at Downing's deposition on August 31, 2004.

## ARGUMENT

### The Lost Documents

The Respondents' argument is based on pure speculation that the U.S. Attorney's Office acted in bad faith or tampered with the evidence instead of having simply lost several documents which were not considered to be of evidentiary value. In addition, the Motion is based upon the unfounded premise that the U.S. Attorney's Office is a "co-prosecutor" with the Commission.

First, the law of Florida is clear that evidence lost or inadvertently misplaced is not grounds for dismissal unless there is a showing of bad faith on the part of law enforcement or the prosecution. Guzman v. State, 868 So.2d 498, 509 (Fla. 2003).

In this case, the Respondent contends that note and envelope "would have allowed Judge Holder to test the authenticity of the Papers, possibly trace the identity of the sender, or potentially glean other circumstances surrounding the delivery of the documents to Del Fuoco. Indeed, if the note and envelope existed, Respondent could have forensically tested and analyzed that evidence ..." (Motion to Dismiss, p. 7)(Emphasis added).

In Guzman, supra, the Florida Supreme Court rejected the argument that the defendant was denied due process by the State's "bad faith" destruction of a clump of hair from a murder victim. The defendant had argued that the hair "was potentially exculpatory evidence because, if DNA testing showed that the hair was not [the defendant's] or [the victim's], this would show that someone other than [the defendant] killed [the victim]. {868 So.2d at 509). The Court followed Arizona v. Youngblood, 448 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281, 1988), in which the Supreme Court held that "bad faith exists only when the police intentionally destroy evidence that they believe would exonerate a defendant ... and that the presence or absence of bad faith ... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."

(828 So.2d at 509). The Florida Supreme Court further noted that under Youngblood,"evidence that has not been examined or tested by government agents does not have 'apparent exculpatory value' and thus cannot form the basis of a claim of bad faith destruction of evidence." (868 So.2d at 509).

In addition, the Florida Supreme Court in Guzman noted that the defendant had not shown that the hair sample from the murder scene would have exonerated him or that the officers believed that it might, but to the contrary, the evidence showed that the police officers believed that the hair evidence was irrelevant to solving the case.

Similarly, the Florida Supreme Court in King v. State, 808 So.2d 1237 (2002), in affirming a murder conviction, held that there was no bad faith on the part of the State regarding the destruction of evidence that had not been scrutinized for DNA in the 1977-1979 time period when there was no knowledge of DNA testing. The Court noted that since Youngblood all cases require a defendant to show bad faith on the part of the person destroying the evidence before any relief can be afforded, quoting Youngblood as follows:

> "But we think the Due Process Cause requires a different result dealing with the failure of the State to preserve evidentiary materials of which no more can be said than that it could have been

> subjected to test, results of which might have exonerated the defendant ... We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve useful evidence does not constitute a denial of due process of law." 808 So.2d at 1242.

In this case, Del Fuoco has testified that he did not believe that the envelope and note had independent evidentiary value, but were merely in the nature of a "tip" to be investigated (Del Fuoco depo, p. 84), and their loss does not constitute a denial of due process.

The Respondent cites State v. Powers, 555 So.2d 888 (Fla. 2d DCA 1990), for the proposition that even in absence of bad faith, the loss or destruction of evidence can be so critical to the defense of a case that a trial is rendered fundamentally unfair, warranting dismissal on due process grounds. (Memorandum, p. 10, n. 5) In that case, the district court of appeal held that it was error for the trial court to dismiss DUI charges against the defendant because the sheriff's department had historically not videotaped field sobriety test. The district court noted that in a case where the destruction of evidence is a flagrant and deliberate act done in bad faith with the intention of prejudicing the defense, that alone would be sufficient to warrant a dismissal of the charges. The court noted, however, to establish bad

faith the evidence must "... possess an exculpatory value that was apparent before the evidence was destroyed." 555 So.2d at 891. Similarly, in State v. Daniels, 699 So.2d 837 (Fla. 4th DCA 1997), the court held that it was error to dismiss a case because of the failure of the police to record a drug transaction on tape, noting that "if the trial court is unable to determine whether the evidence would have been exculpatory, a due process violation arises only if there is a finding of bad faith in the failure to preserve the evidence.' 699 So.2d at 838.

Respondent relies upon Murray v. State, 838 So.2d 1037 (Fla. 2003), which involved an investigation of a murder and sexual battery in which police recovered a nightgown and lotion bottle. Defendant argued that DNA test results from the hairs recovered from the victim's nightgown should have been excluded because of questions concerning the handling of the evidence.[2] According to police testimony, the nightgown and lotion bottle were placed in a sealed evidence bag and delivered to the FDLE, but the FDLE analyst testified that, although the sealed bag had no indication that it had previously been opened, it did not contain the bottle of lotion. Three Justices of the Florida Supreme Court, in a

[2] There were numerous questions concerning the admissibility of the DNA test. *See* Murray v. State, 692 So.2d 157 (Fla. 1997).

three-two-two decision[3] ruled, based upon this obvious discrepancy, that the defendant had met his burden of showing the probability of evidence tampering, shifting the burden to the State to explain the discrepancy or that tampering with the evidence did not occur. The facts of Murray are not analogous to the present case. In this case, the documents in question were not considered to have independent evidentiary value, Del Fuoco could not recall whether he personally placed it in the file or whether the file was secure and the documents were removed from the file on a number of occasions for review or copying (Del Fuoco depo, pp. 70-72, 87-93; Downing depo, pp. 16-19). Moreover, there is no discrepancy between the testimony of Del Fuoco and Downing. Downing testified that when he became aware that the envelope and note were not in the file, he asked Del Fuoco, who responded simply that the documents should have been in the file. The fact that the envelope and note cannot now be found does not lead to the conclusion that the evidence has been tampered with, but only, as assumed by Respondent's counsel and Del Fuoco, that at some point the documents were simply lost (Del Fuoco depo, pp. 134-135).

More closely in point is State v. Thomas,826 So.2d 1048 (Fla. 2d DCA 2002). In that case, the defendant's "faux" drug

[3] Three Justices concurred in the result only.

transaction was videotaped, but at the time the case was to be set for trial, the prosecutor informed the court that the sheriff's office had been unable to locate the videotape. The defendant contended that the videotape "might" clear him of the charges, and the trial court dismissed them. The dismissal was reversed by the district court of appeal because the defense, as here, never contended that the videotape was anything more than potentially helpful.

Finally, Respondent erroneously contends that the Department of Justice or the U.S. Attorney's Office is a "co-prosecutor" with the Commission.[4] Originally, the U.S. Attorney's Office referred the matter to the Commission and provided additional documents when they came into the U.S. Attorney's possession. Assistant U.S. Attorneys Downing and De Fuoco then held the documents for chain of custody purposes until they were turned over to the undersigned at their depositions. The U.S. Attorney's Office did not discuss "strategy" with the Commission's counsel, but simply how to authenticate the documents held in the U.S. Attorney's custody. In addition, although Special Counsel did advise

[4] In another motion pending before the Commission, the Respondent contends that the Commission did not have the authority to subpoena the records of the Air Force investigation because the Commission is not a law enforcement agency. *See* Motion in Limine to Exclude All Documents Provided by the United States Air Force.

Downing that the matter was to be treated as confidential, it was not because of some conspiratorial investigation, but because Article V §12(a)(4) of the Florida Constitution requires for the protection of the judiciary that matters under investigation be treated as confidential until formal charges are filed.

**Restrictions on Testimony**

The Respondent also complains that the Department of Justice restricted his right to examine Del Fuoco and Downing, including questions regarding any investigation and any testing that may have been performed related thereto. (Motion, pp. 11-12). Any restrictions placed by the Department of Justice, however, are not the fault of the Commission, but because of the failure of Respondent to follow the federal procedure, pursuant to 28 C.F.R. §1621, et seq., relating to testimony of federal law enforcement officers regarding their official duties.

The Commission, through its undersigned counsel, followed the federal procedure in order to establish the chain of custody of the documents. (*See* letter attached hereto as Exhibit C). Respondent, on the other hand, made only a very general request pursuant to 28 C.F.R. §1621, to which Paul Perez, United States Attorney for the Middle District of Florida responded:

> "While you have not specified your areas of inquiry, you represent that it is being conducted pursuant to the provisions of 28 C.F.R. §§ 1621 et seq.
>
> This letter authorizes the depositions of AUSA Del Fuoco and AUSA Downing but only as to those matters contained in items 1 through 5 of my December 18, 2003 letter to Mr. Charles Pillans."

(Ex. 9C to Motion).

Although counsel for Respondent apparently had further conversation with the U.S. Attorney's Office (Ex. 9E to Motion), they did nothing to follow up and make a specific request regarding the information sought in the depositions of Fuoco and Downing.

Respectfully submitted,

INVESTIGATIVE PANEL OF THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

Thomas C. MacDonald, Jr.
Florida Bar No. 049318
1904 Holly Lane
Tampa, Florida 33629
(813) 254-9871
(813) 258-6265 (Facsimile)

General Counsel for the Florida
Judicial Qualifications Commission

- and -

BEDELL, DITTMAR, DeVAULT, PILLANS & COXE
Professional Association

By_____

Charles P. Pillans, III
Florida Bar No. 0100066
101 East Adams Street
Jacksonville, Florida 32202
(904) 353-0211
(904) 353-9307 (Facsimile)

Special Counsel to the Florida
Judicial Qualifications Commission

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to each of the following by United States mail this _____ day of April, 2005.

Honorable John P. Kuder
Circuit Judge
Judicial Building
190 Governmental Center
Pensacola, FL 32501

**Chairman of the Hearing Panel**

John R. Beranek, Esquire
Post Office Box 391
Tallahassee, FL 32302-0391

**Counsel for the Hearing Panel**

David B. Weinstein, Esquire
Bales Weinstein
Post Office Box 172179
Tampa, FL 33672-0179

Juan Morillo, Esquire
Steven T. Cottreau, Esquire
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

**Attorneys for Circuit Judge Gregory P. Holder**

_____
Attorney